ORIGINAL

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CompTel

EX PARTE OR LATE FILED

December 17, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 99-295

Dear Ms. Salas:

Pursuant to the Public Notice issued on December 10, 1999, CompTel submits an original and two copies of its response to the Bell Atlantic ex parte letter, filed December 10, 1999.

Sincerely,

Jonathan D. Lee
Vice President,
Regulatory Affairs

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by New York Telephone	)	
Company (d/b/a Bell Atlantic-	)	CC Docket No. 99-295
New York), Bell Atlantic Communications,	)	
Inc., NYNEX Long Distance Company,	)	
And Bell Atlantic Global Networks, Inc.	)	
For Authorization to Provide In-Region,	)	
InterLATA Services in New York	)	

EX PARTE COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION IN OPPOSITION TO BELL ATLANTIC'S PROPOSED ADVANCED SERVICES SEPARATE AFFILIATE

On December 10, 1999, Bell Atlantic-New York ("BA-NY") filed an *ex parte* letter with the Commission in the above-captioned proceeding proposing to establish a separate affiliate for the provision of xDSL services in order to "ensure that competing providers of such services continue to receive non-discriminatory access to services and facilities."[1] The proposed separate affiliate would be established, with slight modifications, according to the terms of Paragraphs 1-14 of Appendix C of the Commission's Order in the SBC/Ameritech Merger ("*SBC/Ameritech conditions*").[2] Pursuant to the Commission's December 10, 1999 Public Notice requesting responses, the Competitive Telecommunications Association ("CompTel")[3] submits these

[1] Letter from Thomas Tauke, Bell Atlantic, to Chairman William Kennard (Dec. 10, 1999) CC Docket No. 99-295 [hereinafter *"BA ex parte letter"*].

[2] *See* In Re Applications of Ameritech Corp. and SBC Communications For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines, *Memorandum Opinion and Order*, CC Docket No. 98-141, (rel. Oct. 8, 1999) [hereinafter *"SBC/Ameritech Order"*].

[3] CompTel is the leading industry association of competitive telecommunications providers, with over 350 members nationwide. CompTel has 22 members certified to provide local exchange services in New York.

comments and respectfully asks the Commission to disregard Bell Atlantic's inadequate, and impertinent, 11th hour proposal. There is no basis in Commission precedent, or in the evidentiary record in this proceeding, for BA-NY's presumption that it can unilaterally "MFN" into a portion of the conditions established in another, entirely different, proceeding in order to satisfy concerns about its present compliance with the Competitive Checklist of §271(c)(2)(B). Moreover, when the FCC does, finally, determine that BA-NY has actually complied with the Checklist, the Commission will determine if a separate data affiliate is needed. If the Commission decides to require an affiliate, only an affiliate that is, at a minimum, operationally separate, and subject to other pro-competitive conditions, can serve the Commission's intended purpose of preventing future non-discrimination.

I. THE BA-NY PROPOSAL IS A THINLY DISGUISED REQUEST FOR AN *ULTRA VIRES* GRANT OF FORBEARANCE

In its *ex parte* letter, BA-NY asserts its "belief" that it has demonstrated that it is presently providing non-discriminatory access to unbundled local loops. This is disingenuous and nothing more than a "boilerplate" disclaimer of what BA-NY is truly asking the Commission to do, which is to disregard established procedural safeguards and the Act itself. The simple fact that BA-NY has proposed a separate data affiliate at all is an acknowledgement that the vast majority of the evidence submitted in this proceeding, including the Evaluation of the Department of Justice, would require the Commission to conclude that BA-NY has not yet (and had certainly not at the time of its application) demonstrated present compliance with the Competitive Checklist. If BA-NY truly believed that it had met its burden of proof and conclusively demonstrated compliance with the requirements of 271, then CompTel questions why it would voluntarily propose a structure it has previously characterized as costly,

duplicative, without a business justification, and likely to require extensive oversight by the Commission.[4] Perhaps it was out of concern for Commission resources that BA-NY proposed only a limited portion of the conditions imposed on the SBC/Ameritech merger and omitted the more stringent conditions such as those providing for compliance and enforcement. If ensuring against future non-performance is BA-NY's only concern, there are adequate, and much less burdensome, post-271 performance proposals already in the record.[5] The fact that this is the only proposal in the record suggesting the need for such a separate data affiliate should incite careful Commission scrutiny.

Ultimately, BA-NY's self-serving statement that it has demonstrated compliance with the Act is immaterial, as is the purpose, and likely efficacy, of its proposal. The BA-NY *ex parte* letter is a constructive admission that it is not providing non-discriminatory access to advanced services network elements and services.[6] BA-NY implicitly asks the FCC to accept its proposal to establish a separate data affiliate in *lieu* of a rigorous evaluation of its DSL policies and performance, on the supposed rationale that the Commission can rest assured that future performance will be nondiscriminatory. If the Commission were to agree with this premise and grant the present application, not only would it be completely abandoning the fundamental procedural fairness of the "complete when filed" policy, but it would also be disregarding the

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[4] *See* In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Notice of Proposed Rulemaking*, CC Docket No. 98-147, Comments of Bell Atlantic at 18-31 [hereinafter Bell Atlantic Advanced Services Comments].

[5] CompTel, itself, urges the Commission to adopt a very comprehensive post-271 performance assurance plan if the Commission is able to determine BA-NY has met the Competitive Checklist. *See* In the Matter of Application by New York Telephone Co. (d/b/a Bell Atlantic-New York), et al. For Authorization to Provide In-Region InterLATA Services in New York, CC Docket No. 99-295, Comments of CompTel at 31-63 [hereinafter CompTel Comments].

[6] *See, e.g.,* CompTel Comments at 22-27.

statutory requirements of Section 271, and, at the same time, making an illegal grant of forbearance in contravention of Section 10(d).[7]

It is quite clear that this separate affiliate proposal amounts to nothing more than forbearance dressed up in new clothes. BA-NY does not even pretend that these promises—most of which would not be implemented for several months—demonstrate its past compliance with Section 271. Nor do the promises refute any of the evidence demonstrating its non-compliance. Moreover, as we have noted, Bell Atlantic previously admitted that a separate affiliate "makes no business sense."[8] Thus, the only purpose for which a separate affiliate would be used by BA-NY is to deflect Commission scrutiny of its compliance with Section 271(c)(2)(B). The Commission's acceptance of this last minute separate affiliate proposal, would itself be tantamount to forbearing from applying Section 271 in the first place. Whether BA-NY avoids Section 271(c)(2)(B) by shifting resources to an entity created outside the rule or whether the FCC excuses BA-NY from compliance with these requirements for certain services, the result is the same. In each case, competitors, and consumers, lose the rights granted to them under the Act.

II. THE SBC/AMERITECH CONDITIONS ARE NOT A "SKELETON KEY" FOR COMMISSION APPROVAL

Assume, *arguendo*, that the BA-NY proposal was not calculated to cure a fundamental infirmity in its application, but simply seeks, as it states, to assuage Commission concerns about *future* performance. Further assume that BA-NY, despite previous assertions to the contrary, genuinely believes that a separate data affiliate would ensure against post-271 discrimination in

[7] 47 U.S.C. § 160. Section 10(d) provides that the FCC cannot grant forbearance under Section 10(a) from compliance with Sections 251(c) or 271, until it has first determined that the requesting carrier has "fully implemented" these Sections.

[8] Bell Atlantic Advanced Services Comments at 29.

the provision of xDSL services. Even with these assumptions of legitimacy, BA-NY's decision to propose the *SBC/Ameritech separate affiliate* is puzzling because there is no logical basis in either FCC precedent, or in evidence in this proceeding, to support BA-NY's assertion that this affiliate structure will provide the solution they supposedly seek.

The differences between the set of conditions the FCC adopted in its *SBC/Ameritech Order* and the portion of one of those conditions that BA-NY proposes here are more readily apparent than are any similarities between the circumstances of the two proceedings. The *SBC/Ameritech* proceeding concerned a merger of two ILEC potential competitors, neither of which was (at the time the conditions were imposed) providing, or seeking to provide, in-region interLATA service.[9] Additionally, and most significantly, the particular requirements that BA-NY would like to "MFN" into for purposes of this proceeding were only part of an entire set of conditions which included DSL-related OSS improvements, with interim discounts for "un-enhanced" OSS, non-discriminatory roll-out of DSL services, as well as conditions providing for enforcement. Moreover, there were numerous other conditions all designed to produce countervailing social and competitive benefits to overcome the Commission's determination that the merger was anticompetitive.

Notwithstanding those differences, BA-NY does cite, in support of its proposal, to some of the Commission's reasoning in adopting the affiliate structure proposed by the merging parties. However, Bell Atlantic incorrectly relies upon the FCC's explanation of the *purpose* of a particular condition as a *holding* on Commission policy. This error is apparent upon even

[9] This distinction is relevant in this proceeding, because if BA-NY gets approval, then it must, as a matter of law, provide both interLATA voice and information services from an affiliate that meets the requirements of Section 272, which this affiliate, by its terms, does not. If the Commission approves this proposed affiliate, then it cannot allow BA-NY to sell interLATA services out of this affiliate. Moreover, compliance monitoring will be more difficult with two separate affiliates.

casual perusal of the *Order*. In ¶ 357, the Commission expressly disclaims such an interpretation of the *Order*,

> [n]or are the conditions we adopt today intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272. . . . *The conditions are designed to address potential public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services market.* . . . All of the conditions we adopt today are merger specific and not determinative of the obligations imposed by the Act. . . . In particular, we note that our adoption of SBC/Ameritech's proposed conditions does not signify that, by complying with these conditions, SBC/Ameritech will satisfy its nondiscrimination obligations under the Act or Commission rules.[10]

So, while the Commission, in its public interest analysis, squarely addressed the assertion that these conditions could not substitute for specific statutory obligations under other parts of the Act, the Commission also recognized that future merger partners may be tempted to consider these conditions to be a type of "skeleton key" for Commission approval. In the context of future *mergers*, which were the only future proceedings in which the FCC rationally anticipated these conditions would be offered, the Commission also attempted to discourage parties from the assumption that a rote incantation of these conditions would always satisfy the public interest test.[11] More significantly though, in the context of the present 271 application, there is absolutely no FCC legal precedent to support Bell Atlantic's assertion that, by adopting some of the separate affiliate conditions from an unrelated merger, it will, thereby, ensure that competitors and consumers receive the benefits of non-discriminatory access to xDSL services.

Finally, there is no empirical evidence in the record to suggest that the conditions the Commission imposed in the *SBC/Ameritech Order* have been effective in addressing the concerns they were meant to address, or that these conditions would be likely to address the

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[10] *SBC/Ameritech Order*, ¶357, at 146 (emphasis added).

[11] *See id*, ¶361, at 147.

Commission's concerns in the present case. Moreover, these conditions are currently being challenged on appeal.[12] This is significant, because the conditions themselves state that the obligations "sunset" nine months after a final, non-appealable judicial decision determines that the separate affiliate is a "successor" or "assign" of the ILEC, within the meaning of Section 251(h).[13]

II. The Proposed Affiliate Conditions Do Not Ensure That Competitors or Consumers Will Receive Non-discriminatory Access To xDSL Services

In the SBC/Ameritech merger proceeding, CompTel expressed its strong concern that such an affiliate lacks sufficient separation to offset the obvious anticompetitive harms that can result when a vertically integrated firm is a monopoly input supplier to its downstream competitors.[14] Here as there, CompTel maintains that it is inappropriate for the Commission to permit an affiliate that retains the advantages of integration with the ILEC to evade a legal determination under Section 251(h) that it is a "successor or assign" of an ILEC and thus avoid the market-opening requirements of Section 251.[15] Moreover, the BA-NY affiliate proposal may contain additional features that further decrease the likelihood that these conditions would actually ensure against future discrimination in the DSL services market. CompTel has, in several proceedings before the Commission, expressed its concerns that, unless a separate affiliate is truly separate, and governed by a set of strict non-discrimination safeguards, the

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[12] *See* Telecommunications Resellers Association ("TRA") v. FCC, Case No. 99-1441 (D.C. Cir., filed November 8, 1999). CompTel has intervened in support of TRA.

[13] *See SBC/Ameritech Order*, ¶ 367, at 151.

[14] *See* CompTel Comments in the *SBC/Ameritech Order* at 21-30.

[15] "If the separate Advanced Services affiliate does not deviate. . . from the requirements of 47 U.S.C. § 272(b), (c), (e), and (g), except as described. . . such separate affiliate(s) will not be deemed a successor or assign of a BOC or incumbent LEC for purposes of applying 47 U.S.C. §§ 153(4) or 251(h)." Appendix C, ¶3, at 3.

ILEC-affiliate structure is likely to do more harm than good.[16] We will not catalog all of our previously asserted concerns, but will describe how some of these conditions are likely to reduce competition, if not addressed.

As was noted above, the separate affiliate structure relieves the DSL affiliate of the resale requirements of Section 251(c)(4). Assuming all potential facilities-based DSL providers have not yet completed their planned deployments in New York, this condition will prevent carriers in the process of deploying DSL facilities to compete for large contracts, or realize marketing economies, over large areas where they need to "fill in" with resale.[17] If resale is not available at all, many residential consumers will likely not have a competitive choice of DSL provider for some time. This exacerbates concerns that, because the affiliate is allowed to engage in so many joint marketing activities, including bundling of voice, data, and internet, the affiliate, which may in some areas have market power in as many as two of these three services (voice and data), will be able to more effectively use bundling, tying, and price discrimination to protect and exploit its current monopoly markets, and potentially, extend them into previously competitive markets.

Another concern about this affiliate is that condition 7 in the BA-NY *ex parte* allows BA-NY discretion to remove the splitter from ILEC (it was considered terminating, not advanced, equipment in the *SBC/Ameritech Order*). This is troublesome because it would allow BA-NY

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[16] *See, e.g.,* CompTel Advanced Services Comments at 6-13, 14-16, 19-35; CompTel Advanced Services Reply Comments, filed October 16, 1998, at 12-20; CompTel Comments in the *SBC/ Ameritech Order*, n. 14, *supra*. *See also* "Petition for Declaratory Ruling or, In the Alternative, for Rulemaking" submitted by CompTel, Florida Competitive Carriers Association and Southeastern Competitive Carriers Association, CC Docket No. 98-39, filed March 23, 1998 (seeking to establish the proper regulatory classification of ILEC local service affiliates).

[17] In its "Line Sharing Order," the FCC cites to a Telechoice survey, which notes that around 80% of ILEC DSL deployment has been to residential customers, whereas only around 20% of CLEC deployment has been targeted to residential customers. *See* In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Third Report and Order*, CC Docket No. 98-147 (rel. Dec. 9, 1999), n.65, at 19. Presumably, this finding implies that many, if not most, residential (and small business) customers will have only the ILEC as a potential DSL provider.

the discretion to raise rivals' costs by requiring each data competitor to install its own splitter, rather than efficiently sharing BA-NY's existing, non-proprietary facilities.

IV. THE COMMISSION SHOULD REQUIRE GREATER STRUCTURAL SEPARATION AND ESTABLISH RULES TO PREVENT DISCRIMINATION BY THE ILEC AND THE AFFILIATE

As an initial matter, BA-NY is likely to have market power in both the local exchange market, and, at least in some locations (until competitors are in every end office in which BA-NY has advanced facilities), the DSL market. Because of this "dual" market power, the 272 safeguards, which are stronger than those proposed and apply to an ILEC's participation in *competitive* markets, are not strong enough to prevent the potential for abuse by a substantially unregulated, but still integrated, affiliate.

Therefore, the Commission should take additional precautions to ensure that this separate affiliate is truly separate. To this end, the FCC should require at least some separate, public, ownership of the advanced services affiliate. The Commission should also abolish the many preferential provisioning arrangements provided for in the SBC/Ameritech separate affiliate. All shared services or assets that are "shareable" should be made available on the same, cost based, terms to non-affiliate CLECs. The ILEC and the affiliate should not be able to share employees, assets (including names and trademarks), and expenses (like advertising). This affiliate should truly be on equal footing with any CLEC. To this end, the FCC must make this affiliate completely, *structurally* separate.

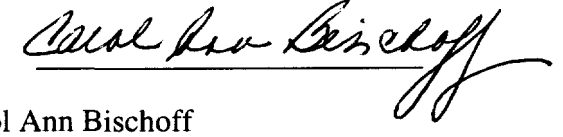
Also, if the advanced services affiliate is to truly be on equal footing with any other CLEC, then it should not be allowed to provide any of the ILEC services through resale, as is allowed under the SBC/Ameritech affiliate conditions. Because resale inherently favors the ILEC affiliate vis-à-vis other CLECs, the BA-NY affiliate should be required to provide its services through UNEs. This would require the affiliate to buy and combine network elements at

cost-based prices, the same as any other CLEC. Moreover, this should be the only way the separate affiliate could jointly market ILEC and advanced services. This restriction will provide BA-NY a greater incentive to provide all Checklist elements, not just advanced services, on an efficient non-discriminatory basis.

Because of the potential for anticompetitive harm, a weak separate affiliate is worse than no separate affiliate. Therefore, the Commission should either dismiss BA-NY's proposal, as it stands, or require additional safeguards to give the ILEC affiliate incentives which will benefit competition and consumers. Finally, if the Commission relies on the existence of a separate affiliate as a condition of a grant of authority under Section 271, then the Commission also must delay the effective date of the 271 approval until BA-NY has demonstrated compliance with the Commission's separate affiliate requirements. The Commission should also adopt, as a condition of approval, a comprehensive performance assurance plan, so that the Commission can assess the efficacy of and, if necessary, modify the separate affiliate requirements as performance dictates.

Respectfully submitted,

Competitive Telecommunications Association

By: 

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